

No. 11,023

In the United States
Circuit Court of Appeals
For the Ninth Circuit

CHESTER BOWLES, Administrator,
Office of Price Administration, *Appellant,*

VS

PATRICK LUMBER COMPANY
(a corporation), *Appellee.*

Brief for Appellee

Upon Appeal from the District Court of the United States
for the District of Oregon

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Appellant,

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STATEMENT OF THE CASE

It is not intended here to duplicate anything appearing in Appellant's statement but to supplement its somewhat meager outline.

In 1943 the Central Procurement Agency was having difficulty in getting enough 1 inch boards (34)* to supply the needs of the Army and Navy (105) and was crowding the mills for deliveries of such boards (34). One such

*Figures in () refer to pages of printed transcript of record.

mill was West Side Lumber Company of Eugene, Oregon, which produced and shipped the lumber involved in this case. It was trying to find some way to increase its production of boards. It was a circular head-rig mill of medium or small size, and not having a band head-rig or the better equipment customary in larger mills, it was not as accurate as they in sawing, so that there was a variance in size of the lumber it produced as it came from the head-rig (35). It was primarily what is called a plank mill (105). It was cutting lots of 3 inch plank. Its rigs were not well enough lined up to get as accurate sawing as desired and from $\frac{1}{8}$ to $\frac{1}{4}$ inch variance in thickness of plank resulted (120, 121). In order to produce boards it got a re-saw. Re-sawing 3 inch plank (106) it got boards surfaced to $\frac{25}{32}$ of an inch and had left lumber (in four different grades,—select structural, select merchantable, paragraph 215, and No. 2 common) which in the instance of the three cars here involved it offered to sell to the Appellee surfaced one side, hit-and-miss, to $1\frac{1}{2}$ inches, surfaced two edges to standard. A technical trade and industry question being involved, two representatives of the mill and two other representatives of the Appellee independently studied and checked (36) the price regulations (exhibit 6) and finally came to an agreed interpretation thereof on the ceiling prices that would be applicable to this lumber. Then only did the Appellee

order the lumber which the mill invoiced to it as disclosed by exhibits No. 7, No. 8, and No. 9 (114, 116 and 118) at the prices so determined. The Appellee resold this lumber to John Schroeder Lumber & Supply Co. of Milwaukee, Wisconsin, at the identical prices so determined, invoicing the same to its customer as disclosed by exhibits No. 3, No. 4 and No. 5 (64, 65 and 66). The items sold and invoiced by the Appellee were of the same description as those which it bought from the mill at Eugene (16). The dates of these invoices are highly important. They were September 3, 1943, and September 16th and October 7th of that year.

The apparent source and motive of this action came from West Coast Lumbermen's Association (19, 20, 37). Appellant's sole witness was employed at the time of trial as an investigator in its Lumber Enforcement Unit. Before that he was a buyer for the Appellee (50). He told Appellee's President in August, 1944, that the West Coast Lumbermen's Association wanted West Side Lumber Company checked up, that the Appellant was investigating, and that he thought Patrick Lumber Company was going to have trouble on these cars (31).

Exhibit No. 13 (128) is a letter that the sawmill wrote on June 8, 1944 to the Office of Price Adminis-

tration, Lumber Division, Washington, D.C., the first sentence thereof reading as follows:

"In accordance with request of Mr. Jerome S. Bischoff of Portland, Oregon, OPA Office, we wish to submit the following request for special price authorization for 2" dimension S1S2E 1½" hit-and-miss."

This letter was answered June 22, 1944 by Peter A. Stone, Price Executive, Lumber Branch, OPA. The mill's request was declined. The answer is Exhibit No. 14 (129, 130).

Next followed communications on the subject between Mr. Bischoff and Mr. Stone (30). Disclosure of the contents of these communications was refused to the Appellee.

Then on August 3, 1944, Mr. Stone wrote the mill a letter and withdrew his previous declination. This letter is Exhibit 15 (131) and reads in part:

"Under Section 12, RMPR 26, we herewith approve as effective during the period from June to October, 1943, inclusive, the following prices, f.o.b. car mill, and weights on which freight charges should be estimated in arriving at delivered prices."

The letter then continues with a table of approved invoice sizes, approved prices and permissible estimated

weights. The following excerpts are also quoted from that letter:

“The prices herewith approved are based upon the following facts:

a. Surfacing 2" green lumber to 1½" would constitute an unwarranted waste never condoned by industry practice and which cannot be approved by this office.

b. 1/8" is sufficient tolerance between dressed size and nominal rough size when “hit and miss” dressing is permissible and both the dressed and rough size is green.

c. Grade paragraphs 215, Select Merchantable, and 301 are designed for stress and durability, and in a case such as this where substandard sizes are sold, such sizes offset any practical grade improvement that would otherwise be accomplished by these paragraphs. Hence, we cannot find justification for approving any price higher than No. 1.”

The Appellant frankly conceded by Mr. Bischoff (16) that the amount of the alleged overcharge was computed by using as a base the retroactively “approved” prices and invoice sizes and (18) that the mills instigated “application was not made until long” after “the lumber was sold and billed and the money received.”

Appellant relies heavily upon Exhibit No. 1, American Lumber Standards, which are concerned fundamentally with three distinct things,—size, grade and inspection. Paragraph 109 (55). Imperfections are permitted “in proportion to their effect on the strength, ap-

pearance or other utility value of the piece in the grade under consideration". Paragraph 117 (58). See also Exhibit No. 2 at page 43 defining the grade called Paragraph 215 and permitted imperfections and reading in part:

"A serious combination of above affecting utility of piece not permitted."

Paragraph 204 (60) reads:

"The grading of lumber cannot be considered an exact science because it is based on a visual inspection of each piece and on the judgment of the grader. Grading rules, however, shall be sufficiently explicit to establish 5% below grade as a reasonable variation between graders".

The Appellant also sued the sawmill for treble damages in respect of this identical lumber and claims the right to recover both from the sawmill and from the Appellee,—in all six times the amount of the alleged overcharge on the same transaction (22, 23).

Appellant to the contrary notwithstanding, (16, 21) it is *not* "stipulated in the agreed statement of facts" or otherwise "that there is no dollar and cents price in the regulation for this item". Appellant and Appellee "are in direct conflict" (39) on this point. Although the printed transcript of record contains various references to

“agreed” statements of fact and to “agreed” conclusions of law, no completed drafts of either were ever signed and the only agreements reached by the parties on facts or on conclusions of law resulted from oral stipulations in open Court by their respective attorneys.

ARGUMENT

I.

Defendant-Appellee's Sales of the Lumber Involved in this Suit Were not Shown by a Preponderance of the Evidence to be Subject to the Provisions of Section 12 of the Regulation.

The lumber so sold was of four grades,—select structural, select merchantable, Paragraph 215, and No. 2 common. These grades depend upon the imperfections which the published rules (Exhibit No. 2) “will admit”. For example, these imperfections for the “paragraph 215” lumber listed in the Appellee's invoices are set out in Paragraph 215 on page 43 of Exhibit No. 2, and include knots of various types and sizes, knotholes as specified, checks, medium pitch pockets, medium sap stain, occasional skips, splits as specified, occasional slight variation in sawing, and wane. These imperfections are not related to the thickness of the piece. They are related directly, however, to its face width. For example, Para-

graph 215 lumber of 4 inch face width will admit knots of 1 inch size, but if the face width is 10 inches, the knot size may be $2\frac{1}{2}$ inches. These various grades definitely fix in specified terms of admitted imperfections the quality of lumber as it is bought and sold as a commodity. Exhibit 2 also specifies with particularity the admissible imperfections for the other three grades of lumber listed in the Appellee's invoices.

Now what did Section 12 of the Regulation (Exhibit No. 6) require? That Section is headed "Grades, Services, or Extras not Listed". Subparagraph (a) of that Section reads (so far as it is pertinent here):

"If a seller wishes to sell a grade which is not specifically priced in the price tables, or wishes to make an addition for special workings, specifications, services or other extras, for which additions are not specifically permitted, he must apply to the Lumber Branch, Office of Price Administration, Washington, D. C., for a maximum price". . . .

The four grades of lumber invoiced by the Appellee to its customer were all specifically priced in Price Table 2 of Exhibit No. 6,—select merchantable in Note 2, select structural in Note 3, No. 2 Common in Note 4, and Paragraph 215 in Note 12.

The Appellee did not sell or wish to sell to its customer lumber of a grade other than select merchantable,

select structural, Paragraph 215 and No. 2 common. In this connection the Judge presiding at the trial questioned Mr. Bischoff (Plaintiff-Appellant's Attorney) and was answered by the latter as follows (75):

"The Court: These were billed as certain grades of lumber known to the trade?

Mr. Bischoff: That is correct.

The Court: But you say they were not up to the billing?

Mr. Bischoff: No, we are not making that claim here."

Nor did the Appellee as a seller wish "to make an addition for special workings, specifications, services or other extras". . . . Therefore the Appellee had no occasion to apply for a maximum price and did not do so.

The Appellant argues unconvincingly that *grade* is used interchangeably with *item*. The argument is *tabula in naufragio*. Lumber items are of numerous kinds as Exhibit No. 2 discloses. They may be in description *generic*, like Dimension, or *special*, like Joists. A particular item (depending on its quality) may fall into any one of six or more grades. See Price Table 2, for example, of the regulation where the same *item*, (depending on the prevalence or paucity of its imperfections) may be in respect of *grade*, No. 1 common, or select merchantable, or select structural, or No. 2 common, or No.

3 common, or No. 4 common, or Paragraph 215,—7 *grades* for a single *item* with a different price for each *grade* of that item.

The Appellant interprets Section 12 (a) as if it read:

If a seller wishes to sell an item which in size varies from the published standards for *American Soft Woods, and for †Douglas Fir, he must apply to the Lumber Branch, Office of Price Administration, Washington, D. C. for a maximum price. . . .

That will not do for various reasons, some of which follow:

1. Section 12(a) is confined by its terms (so far as this case is concerned) to *grades*.

2. In Price Table 2 itself what is meant by word *grades* is described in the first 13 Notes to that table. Notes 2, 3, 4, and 12 describe the four grades listed in the Appellee's invoices to its customer.

3. *Grade* is carefully distinguished from *size* in American Lumber Standards (Exhibit No. 1). See in this connection caption preceding Paragraph 105 and reading (with emphasis supplied) "Maintenance of *size* and *grade* standards" (54); Paragraph 105 reading in part (with emphasis supplied) "published *size*, *grade* and inspection standards" (54); Paragraph 107 reading

*Exhibit No. 1. †Exhibit No. 2.

in part (with emphasis supplied) "the standards of *size* and basic *grade*, names and classifications" (55); Paragraph 108 reading in part (with emphasis supplied) "*size, grade* and inspection standards" (55); Paragraph 109 reading in part (with emphasis supplied) "*size*, standards, basic *grade* classifications, and inspection standards" (55); Paragraph 112 reading in part (with emphasis supplied) "standards of *size* and *grade*" (56); caption preceding Paragraph 114 and reading in part (with emphasis supplied) "*size* and *grade*" (57); Paragraph 115 reading in part (with emphasis supplied) "Standard *sizes* or *grades*" (57); and Section 22 (of regulation No. 26, exhibit No. 6) reading in part (with emphasis supplied) "*grade* and *size* terms."

4. Exhibit No. 2 on page 142 specifies standard *sizes* (thicknesses and widths) for numerous *products* of West Coast lumber in *grades* suitable for construction. Here, too, there is no confusion of *grade* with *size* or *product*.

5. Exhibit No. 2 is entitled "Standard Grading and Dressing Rules" for Douglas Fir lumber. Here again *grading* (ascertaining the quality) is distinguished from *dressing* (surfacing the lumber). Sawing lumber to standard size with absolute precision is impossible even in the largest, most modern and most completely equipped mills mechanically. Accuracy in sawing is still more difficult

for the medium and small sized mills to achieve that like West Side Lumber Company are set up primarily to produce plank. These rules (Exhibit No. 2) recognize that disability and provide for variation. They contain the following paragraphs on the subject:

“92. Variation in sawing as specified in these rules means less or more than the nominal rough green size and must not be confused with *intentional scant sawing.

“93. Slight variation in sawing is a deviation from the nominal size and shall not exceed the following limits for the respective sizes:

Nominal

| | | | | |
|---------------|-------|----------|------|------|
| 1" | 1/16" | under or | 1/8" | over |
| 2" | 1/8" | " " | 1/4" | " " |
| 3" to 7" | 3/16" | " " | 3/8" | " " |
| 8" & over .. | 1/4" | " " | 1/2" | " " |

“94. Standard sawn lumber is sawn to the nominal rough green sizes specified in the Grading Rules, with the occasional variation in sawing permitted in the Rules.”

Under the Appellant's theory, however, (1) any variation in size from the published standard automatically subjects the lumber sold to the provisions of Section 12 of the regulation, and (2) the amount or degree of such variation is immaterial, so that the Appellee would have been answerable for not complying with Section 12 if

* There is no evidence in the record of “intentional scantsawing” on the part of the mill.

the lumber it sold actually had been (instead of 1 16/32" in thickness) 1 17/32" or 1 18/32" or 1 19/32" or 1 21/32" in comparison with the standard of 1 20/32" (1 5/8").

6. Section 22 of the regulation reads in part as follows:

"All grade and size terms and 'paragraph' references appearing in this regulation refer to and have the meaning given in the standard grading and dressing rules No. 12 issued by the West Coast Lumbermen's Association"

The rules (Exhibit No. 2) last mentioned (including paragraphs 92, 93 and 94 thereof) therefore govern the interpretation to be given to Section 12 of the regulation.

7. The Appellee does not concede that the prices approved retroactively by the Price Executive ever had or could have any validity under the circumstances here appearing, but if the Appellant's argument on this point were conceded, it is plain that the Office of Price Administration did not within 30 days either authorize a price or require further justification of the requested price and that therefore the requested price must be considered to have been approved in accordance with Amendment 9 of October 30, 1942, printed in Note 8 on page 18 of Appellant's Brief and reading in part as follows:

"The Office of Price Administration shall within 30 days of the receipt of the application either authorize the requested price or authorize a price which is deemed proper. Authorization may be by letter or telegram. If the Office of Price Administration does not within 30 days either authorize a price or require further justification of the requested price, the requested price shall be considered approved."

Here the mill's application was dated June 8, 1944 and the Price Executive's authorization (Exhibit No. 15) was dated August 3, 1944.

In these circumstances the retroactively established prices cannot avail to serve the Appellant as a basis for the alleged overcharge.

II.

Defendant-Appellee's Sales of the Lumber Involved in this Suit were not Shown by a Preponderance of the Evidence Not to be Subject to the Provisions of Table 2.

1. The Appellee used the prices named in Table 2 in invoicing the lumber to its customer. This can be illustrated by reference to Exhibit No. 4 (65). On this invoice is listed an item of 2 pieces (of 2x6" each 22 feet long of green select merchantable) containing 44 board feet which it sold to its customer for \$2.28 at the rate (including freight to destination) of \$51.75 per thousand feet board measure. The price named in Table 2 for

2x6" of 22 foot lengths is \$31.00 per thousand feet board measure for No. 1, to which Note 2 authorizes the addition of \$3.00 for the *grade* of select merchantable,—\$34.00 in all or 3.4 (34 divided by 1,000) cents per board foot, or \$1.496 (.034 times 44) for 44 board feet. This lumber was sold (as the invoice discloses) on a freight rate of .755 per hundred pounds to Milwaukee, Wisconsin from Danebo, Oregon. The Appellee estimated that all the 2x6" lumber listed in its invoices weighed 2350 pounds per thousand feet board measure, or 2.35 pounds per board foot, or 103.4 pounds for 44 board feet. See in this connection Exhibit No. 13 (128). The freight charged by the Appellee to its customer was 78 cents (1.034 times .755). \$1.496 plus .78 equals \$2.276 (\$2.28) which was the total charge Appellee made to its customer for the two pieces above mentioned.

Appellee sold lumber which Appellant claims was "sub-standard" in respect of thickness. But Appellee's prices were less than the maximum legally applicable on lumber that was standard in respect of thickness.

Now by way of comparison, the total charge may be figured on two pieces of 2x6" each 22 feet long of select merchantable *grade*, green surfaced 4 sides to thickness of $1\frac{5}{8}$ " and to width of $5\frac{5}{8}$ " shipped from Danebo to Milwaukee on a .755 freight rate. The two pieces would

contain 44 board feet. The price named in Table 2 is \$34.00 per thousand feet board measure, or 3.4 cents per board foot, or \$1.496 for 44 board feet. The regulation (exhibit No. 6) on page 49 contains a table of estimated weights per thousand feet board measure for "Fir-Dimension". The lumber sold by the Appellee was green as is disclosed by the invoices. The weight named in this Table for 2x6" S4S, Standard Green is 2550 pounds per thousand feet board measure, or 2.55 pounds per board foot, or 112.2 pounds for 44 feet board measure. The freight charged to the customer at Milwaukee would be \$.84711 (1.122 times .755) or \$.85. \$1.496 *plus* \$.84711 equals \$2.34 or 6 cents more than \$2.28 which the Appellee actually charged. This 6 cent difference is the equivalent of \$1.36 per thousand feet board measure. Obviously no overcharge can be predicated on this comparison.

Next by way of further comparison it will be shown just how a basis was contrived for claiming that the Appellee overcharged its customer. Appellee sold this lumber in the 3 cars, had it shipped, and collected the invoice prices from its customer, all 2 months or more before the close of 1943. On August 3, 1944 the Price Executive, Lumber Branch, Office of Price Administration, at Washington, D. C., wrote a letter (Exhibit No. 15) to the mill (131, 132 and 133) approving "as effective dur-

ing the period from June to October, 1943, inclusive, the following prices f.o.b. car mill and weights on which freight charges should be estimated in arriving at delivered prices". . . . For select merchantable green pieces of 2x6" each 22 feet in length (as invoiced by the Appellee) the Price Executive approved an invoice size of $15\frac{1}{8}$ x6 and a price of \$30.50 per thousand feet board measure, or \$.0305 per board foot. Two such pieces under the approved invoice size would contain (35.75) 36 board feet. The approved price for 36 board feet would be \$1.10 (.0305 times 36). In his letter the Price Executive also approved a table of "Permissible Estimated Weights". The estimated weight for the lumber described in this paragraph was 2850 pounds per thousand feet board measure, or 2.85 pounds per board foot, or 102.6 pounds for 36 board feet. The freight chargeable to the customer would be 77 cents (1.026 times .755). \$1.10 *plus* \$.77 equals \$1.87,—the retroactively approved price for these two pieces. The Appellee charged \$2.28 for them.

Like methods of analysis might be used for every piece of lumber in the 3 cars involved and analogous results would be produced.

Now it remains to point out the arbitrary, unlawful and iniquitous elements contained in the Price Execu-

tive's approvals, which are the sole and indispensable basis for the Appellant's action.

1. Standard green fir dimension has a nominal rough thickness of 2 inches (Exhibit 2, page 142). Surfaced 1 side or 2 its standard thickness is $1\frac{5}{8}$ inches. Dressed 2 edges from a nominal rough width of 6" its standard face width is $5\frac{5}{8}$ ". So surfaced and dressed 2 such pieces each 22 feet long would contain 44 board feet for all purposes of pricing and sale under Table 2 of the Regulation. Three-eighths of an inch loss or tolerance in nominal rough width is allowed for dressing and the same amount of loss or tolerance in nominal rough thickness is allowed for surfacing 1 side or 2 sides. This is normal industry practice and is contemplated by Regulation No. 26. Now in his Approved Invoice Sizes (authority to promulgate which does not appear in Section 12 or elsewhere) the Price Executive on 2x6" pieces (as invoiced by the Appellee) allowed the customary $\frac{3}{8}$ inch tolerance, so far as nominal rough width (6 inches) was concerned, but denied the customary $\frac{3}{8}$ inch tolerance, so far as nominal rough thickness ($1\frac{7}{8}$ inches) was concerned, and allowed only $\frac{1}{8}$ inch, disregarding Paragraph 127 (of Exhibit No. 1) reading: "Lumber finished to special size shall be tallied as of the standard rough size necessarily used in its manufac-

ture." Appellee's lumber (as invoiced) was finished to special size. In the instance of the 2x6" pieces which it invoiced the nominal rough size necessarily used in their manufacture was in width 6 inches (which he allowed) and in thickness $1\frac{7}{8}$ inches ($\frac{2}{8}$ inches of which he disallowed). This disallowance was purely arbitrary and was nothing less than the exercise of usurped authority. Inevitably this disallowance by him could only operate to create apparent overcharges on the part of the Defendant-Appellee. If he had allowed nominal rough thickness of $1\frac{7}{8}$ inches, then the two pieces in question would have contained 41 board feet instead of 36 under his formula.

2. The prices named in Table 2 for 2x6" pieces in random lengths from 6 to 20 feet long were in the *grades* sold by the Appellee as follows:

| | | |
|---------------------|--------------------|--|
| Select Merchantable | \$28.50 plus | \$3.00 or \$31.50 per thousand feet B.M. |
| Select Structural |\$28.50 plus | \$5.00 or \$33.50 per thousand feet B.M. |
| Paragraph 215 |\$28.50 plus | \$2.00 or \$30.50 per thousand feet B.M. |
| No. 2 |\$28.50 minus | \$2.00 or \$26.50 per thousand feet B.M. |

Corresponding prices approved retroactively by the Price Executive were:

| | |
|---------------------|--------------|
| Select Merchantable |\$28.50 |
| Select Structural |28.50 |
| Paragraph 215 |28.50 |
| No. 2 |26.50 |

These reduced "Approved Prices" on Select Merchantable, Select Structural, and Paragraph 215, if valid, obviously would create apparent overcharges on the part of the Appellee on all lumber it sold in those *grades*. The "Approved Price" on No. 2 was not reduced by him below the figure named for that *grade* in Table 2. But for all lumber sold by Appellee in that *grade* his approval (of reduced invoice sizes), if valid, would also create apparent overcharges. It is significant that the Price Executive went to Table 2 for the prices he approved so belatedly,—the very Table to which the Appellee resorted in pricing the lumber to its customer.

In effect the Price Executive in approving reduced prices on Select Merchantable, Select Structural, and Paragraph 215 determined that Appellee's lumber in those *grades* was no better in quality than No. 1. The Appellant's attorney made no such claim (75). There is not a word of evidence even remotely hinting that the Price Executive or any one under him ever saw (much less graded) a single piece of this lumber or that its thickness (as invoiced) impaired in any degree its strength or other utility value in comparison with similar items $\frac{1}{8}$ inch thicker. Sub-paragraph c of his letter is pure unsupported guessing on his part, which the Appellant seeks to use as a basis for penalizing the Appellee heavily. His mention of "a case such as this where sub-

standard sizes are sold" indicates very plainly that he felt he had found an unfair business practice incompatible with sound principles of conservation as the Trial Judge pointed out (7) and that he considered it was incumbent on him to do something about it. But he has no roving commission to exercise authority on his own conceptions of what is sound industry practice. Subparagraphs a, b, and c of his letter are not "facts" as he stated therein, but mere unwarranted assumptions on his part, which the evidence of record fails to substantiate at any point.

RETROACTIVITY

This action is clearly penal in character. A penalty is a sum of money of which the law exacts payment by way of punishment by doing some act that is prohibited. The term involves the idea of punishment, generally pecuniary. Its character is not judged by the mode in which it is inflicted, whether by a civil action or a criminal prosecution. It connotes punishment for a wrong or for a non-fulfillment of an obligation.

The appellant argues that there cannot be much question as to the validity of a "retrospective" price. The Price Executive's retroactive approvals of invoice sizes and of prices cannot serve as a basis for the imposition of heavy pecuniary penalties upon the Defendant-Appellee. To

give such approvals that interpretation would make them violative of the due process clause of the Fifth Amendment of the Federal Constitution, but the invalidity of these retroactive approvals by the Price Executive for any purpose goes even deeper than that. The Price Executive in a very real sense was only the *alterego* of the Administrator of the Office of Price Administration. In making such approvals he was unable by the very force of circumstances to proceed judicially and without favor to the Administrator or bias against the Defendant-Appellee. No administrative action such as is involved in the making of these approvals, which the Appellant contends had the force of law, ought to be permitted to stand when their obvious purpose was to make a case for the Administrator out of transactions that had taken place and been closed months earlier.

When the Appellee made these sales in September and October, 1943, it could not possibly have known what prices the Price Executive would approve in August, 1944, nor could it have any reason to suppose that the Price Executive would undertake to approve maximum prices to be effective only retroactively to cover the period of the sales in question. In enacting the Emergency Price Control Act of 1942 the Congress did not empower the Administrator therein to approve after the effective date of the act maximum prices for lumber sold prior to

such effective date and thereupon to sue a seller for treble damages for charging prices higher than those established by him after the act became effective. If Congress had enacted such legislation, it would have been in that respect plainly violative of the Fifth Amendment of the Federal Constitution. Certainly the Price Executive's authority in this connection cannot exceed the authority that Congress itself might have constitutionally exercised.

This action is to recover treble damages for alleged overcharges claimed to have been made in September and October, 1943 in excess of prices first approved in August, 1944. Before August 3, 1944, but long after the last of the sales in question had become a closed transaction, the Administrator and his attorneys at Portland, Oregon, were in this dilemma. They knew what prices Patrick Lumber Company (the Defendant-Appellee) had charged. But that information would not be enough (without more) to establish an unlawful overcharge. They must also prove by way of comparison legally applicable prices that at the time of sale were lower than those charged. They could not prove that the prices named in Table 2 of the Regulation (which were what the seller charged) did not apply. They could not find in the Regulation any lower prices that by any conceivable stretch even of their own imagination would be applicable to the

lumber the Appellee sold. The most indispensable element of such an action as they contemplated was lacking and they must find means, if possible, by hook or crook, to supply it *nunc pro tunc*. In this predicament Mr. Bischoff who brought this action on his own initiative (109) conceived the idea of procuring the mill to apply for a retro-active approval of the prices that had been charged. The mill, apparently not realizing that a trap was being so set, made such an application (Exhibit No. 13) on June 8, 1944. When prices were eventually approved by the Price Executive with much evident reluctance on his part, the stage was set and it was not long before this action was commenced.

So before the Price Executive on August 3, 1944, promulgated his Approved Sizes and Prices as contained in his letter of that date in evidence as Exhibit No. 15 (131, 132, 133), there existed not even the shadow of a basis for a claim on the part of the plaintiff-appellant that the Appellee had overcharged its customer for the lumber involved in this action. That proposition may be stated differently but with equal accuracy. Approved Invoice Sizes and Approved Prices such as the Price Executive promulgated on August 3, 1944, were absolutely indispensable to the statement of a case by the Plaintiff-Appellant against the Defendant-Appellee. When the

mill's application of June 8, 1944 was made to the Office of Price Administration at Washington, D. C. (128), the Price Executive on consideration of the application denied it for reasons stated in his answer (129, 130). His denial obviously was unsatisfactory to the Plaintiff-Appellant because such denial left it without the material out of which it could make an ostensible case against the Defendant-Appellee. What representations the Plaintiff-Appellant made to the Price Executive between June 22, 1944 (the date of his denial of the mill's application) and August 3, 1944 (the date of his promulgation of the Approved Invoice Sizes and Prices), the Defendant-Appellee does not know. It does know, however, that in that period of forty-two days the Price Executive was aware that any invoice sizes and prices which he might approve retroactively necessarily would have the effect of doing one of two things,—either leaving the Office of Price Administration without any basis in fact for an action against the Appellee for treble damages for alleged overcharges on its part, or on the other hand making a case for the Plaintiff-Appellant by supplying facts or findings theretofore lacking.

As an official of the Office of Price Administration he could not very well approve invoice sizes and prices in such figures as would leave the administrator without

any chance of commencing and prosecuting an action against Defendant-Appellee. He knew very well what invoice sizes and prices he would have to approve in order to create the basis for an action that would stand up *prima facie* against the Defendant-Appellee. Under these circumstances the particular action he took was simply inevitable. Can his action be rationally explained on any theory other than that he deliberately approved invoice sizes and prices that would make a case against the Appellee for the Office of Price Administration, and carefully avoided making approvals that would have prevented the Office of Price Administration from commencing and prosecuting the pending action? This is particularly true since the approval was not prospective in its application but was retroactive "during the period from June to October, 1943."

CONCLUSION

This action is and has been distinctly Pharisaical in its conception and subsequent development. The Pharisees tithed mint, anise and cummin and omitted the weightier matters of the law. It is earnestly submitted that the trial court rightly dismissed this action and that its judgment should be affirmed.

Dated August 22, 1945.

Respectfully submitted,

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